Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

ROBERT ARTHUR GUTSTEIN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Does the reach of the securities fraud statute, 15 U.S.C. §§78j(b) & 78ff, properly extend to protect two *unlicensed* stockbrokers and one *unlicensed* stock brokerage firm from the conduct of a defendant who is charged by the government in a criminal indictment?

(2) Should the ambit of the wire fraud statute, 18 U.S.C. §1343, protect the property interests of an unlicensed stockbroker, when that broker places interstate telephone calls to collect on an illegal transaction?

(3) Is Constitutional error properly found to exist in a criminal securities trial, where the jury was never informed that the "victims" who testified at trial were not licensed to enter a transaction on which the defendant was convicted?

(4) Does a Sixth Amendment Violation for Ineffective Assistance occur in a criminal securities trial, when a defense attorney fails to prepare on matters of routine detail?

Parties to the Proceeding

Robert Arthur Gutstein

The United States of America

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The Petitioner, Robert Arthur Gutstein, respectfully prays that a writ of certiorari issue, to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on May 17, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and deemed a memorandum disposition, and appears in the appendix, at 1a to 6a. The order of the United States District Court for the Central District of California is also unreported, and appears in the appendix at 7a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 17, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 15 U.S.C. §78j(b) & §78ff (securities fraud); 18 U.S.C. §1343 (wire fraud); sections §36-474 and §36-498 of the Connecticut Uniform Securities Statute, and the Sixth Amendment to the United States Constitution.

SUMMARY STATEMENT OF THE CASE[1]

Petitioner Robert Arthur Gutstein is a licensed California physician who currently practices medicine in the Los Angeles area, primarily as a surgeon.

Petitioner was convicted of criminal securities fraud by a Los Angeles jury, in a trial held in a U.S. District Court in 1991. The Jury convicted on 5 counts, and acquitted on 13. Three of the five counts of conviction involved a Texas stockbroker who testified extensively for the government. The petitioner appealed, but his conviction was affirmed in an unreported 1992 disposition.

In 1994, the petitioner was informed by Connecticut authorities[2] that the Texas broker who had testified against him at trial *had never been licensed under state securities law in Connecticut.* (Appendix, 10a to 11a). The three "Texas" conviction counts

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[1] Petitioner has preceded the fairly lengthy statement of facts with this "Summary statement of the case" to simplify the task of the reader . The longer statement of the facts merely provides more detail.

[2] Connecticut authorities advised petitioner in 1995 that brokerage firm employing the broker who testified at trial was not licensed, either.

(counts 11, 14 & 15) were based on a trade executed by the Texas brokers for a resident of the state of Connecticut. The 1991 jury that sat in judgment never knew, when it voted to convict the petitioner, that he had been accused of defrauding an *unlicensed* stockbroker who worked for an *unlicensed* brokerage firm.

After making this discovery, Petitioner sought relief under 28 U.S.C. §2255, on the following grounds:

(1) Ineffective assistance by his retained counsel in the 1991 criminal trial, in part for failing to properly research the license qualifications of the government's stockbroker witness.

(2) Petitioner's convictions should be reversed as a matter of law, because the government was relieved at trial of its Sixth Amendment obligation to prove all the elements of the crimes of securities fraud and mail fraud (Appendix 8a, Issue 3).

The district court summarily denied the §2255 petition (Appendix, 7a). The petitioner timely appealed.

On May 17, 1996 a Ninth Circuit panel held that the unlicensed status of the Texas brokers and brokerage firm was "irrelevant" to the issue of the petitioner's guilt. The panel said it was "not persuaded" that a revelation in front of the jury that the brokers and brokerage firm had never been licensed to do business in the state of Connecticut would have had any effect on the jury's verdict.

In this Pro Se petition for a writ of certiorari, petitioner seeks review of the propriety of his convictions for defrauding an unlicensed stockbroker, where that broker's unlicensed status was kept from the jury. Petitioner asserts that his conduct on Counts 11, 14 & 15 was not criminal, and that the jury's entire decision to convict him may have been effected. Petitioner also seeks review of the determination by the lower courts that his counsel met or exceeded this Court's *Strickland* standard for effective assistance.

STATEMENT OF THE FACTS

In 1983, petitioner became involved with a securities promoter named Jacob Rubenstein and the company that was ultimately to become Magna Technologies.

During petitioner's long career as a physician and surgeon, he had invented several medical devices. Rubenstein explained to Petitioner that it would be possible to finance the development and marketing of Petitioner's medical inventions through a public corporation. Rubenstein located an already public "shell" corporation, gained control of it, and then re-named the shell Magna Technologies (Magna).

Magna traded as a public company between March 1985 and October 1985. Near the end of September 1985, the stock price reached almost $9.00. In the first week of October 1985, the price dropped to near zero, and trading effectively ceased. Manipulation of the stock price of Magna was the core charge in a 42 count criminal indictment, filed March 7, 1990. The indictment named Jacob Rubenstein, the petitioner, a New York market maker named Herb Stone, and Robert Victor as the defendants.

Stone and Victor both pled guilty, and both served substantial prison terms. Jacob Rubenstein fled the United States to Australia, and was a fugitive at the time of petitioner's trial[3]. Petitioner stood trial alone. Ms. Robyn Bennett, the girlfriend of the petitioner during the time period covered by the indictment, was granted immunity by the prosecution in exchange for her trial testimony .

The theory that the government presented to the jury at trial was that petitioner Gutstein was an active and knowing participant in the stock price manipulation of Magna Technologies in 1985. The

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[3] Jacob Rubenstein was later taken into custody in Australia by Australian securities authorities, where he was promoting a company similar to Magna.

government argued that petitioner was responsible, under a conspiracy theory, for 18 criminal counts that went before the jury.

The defense position at trial was that the Petitioner was the unknowing dupe of Rubenstein, and that he lacked the scienter necessary for a criminal conviction. During the trial, the defense presented evidence that Rubenstein had sold over $900,000 of Magna stock during period in question and pocketed that money. Petitioner testified without contradiction that he had sold no Magna stock at all, and had in fact *provided* funds for Magna's operations, using the income from his medical practice.

The government conceded that Rubenstein was the most guilty party of the four indicted, but argued that petitioner had known that the Magna stock promotion was illegal, and that the doctor was therefore guilty of criminal conduct. On the eighteen counts presented to the jury, Petitioner gained acquittal on 13 counts, but suffered convictions on five counts. The five counts of conviction were based on two transactions, both involving Ms. Bennett.

The petitioner was convicted on count 4, a securities fraud count which was based on a purchase by Robyn Bennett of 10,000 shares of Magna stock, on August 2, 1985. Petitioner testified that he had borrowed the money to pay for this purchase of Magna shares for Bennett, and that the shares were *not* sold, prior to the price collapse of Magna in October 1985. Norbay Securities, the brokerage firm that handled the trade, was paid in full. The only party to lose money from the Norbay count was the petitioner. The jury also voted to convict on count 1, a conspiracy charge.

Three of the counts on which Petitioner was convicted (and the primary focus of this petition for certiorari) arose from a purchase order for $132,000 of Magna stock that was entered, but never paid for, at the Dallas office of Texas brokerage firm Eppler, Guerin and Turner (EGT). Count 11 was for securities fraud, and was based on the trade itself; Counts 14 & 15 were for wire fraud,

and these counts were based on the telephone calls made by EGT broker Frank Harrison to the petitioner, on the third and fifth days after the EGT order was entered.

Frank Harrison testified at trial that this large order was entered on a day when he was out of the office. Arthur Ellis, a branch manager for EGT, entered the order on Friday, September 20, 1985. Inexplicably, the defense never called Arthur Ellis to the stand, even though the issue of the identity of the individual who placed the order and guaranteed payment for the order by the petitioner was very much in question.

Harrison testified that branch manager Ellis entered this transaction under his production number, in the name of new EGT customer Robyn Bennett. No deposit was taken nor a reason ever given for the absence of a deposit, since Ellis never appeared to testify. At the time the order was entered, Ms. Bennett was a resident of the state of Connecticut.

Bennett testified that she had called the EGT firm in Dallas from her home in Connecticut, and said that she had merely left a message with an EGT secretary on that Friday. Bennett testified that she spoke to no one but the secretary before the order was executed, and believed that her conversation with the secretary and leaving a message constituted the entry of the order.

Harrison testified to the jury that he had lost his job at EGT at least partly as the result of the Bennett order, because payment for the order was never received. Harrison testified that he had been assured by Jacob Rubenstein that the Petitioner would pay for the Bennett order. Harrison then testified at length about Petitioner and his attempts to collect on the September 20, 1985 trade.

Harrison admitted that he had never spoken to petitioner before the Bennett order was entered, but testified he had called petitioner on Wednesday September 25th and Friday September 27th,

seeking the $132,000 needed to pay for Bennett's order from the petitioner. Harrison recorded his telephone calls to the petitioner, and these recordings were played for the jury.

The jury convicted Petitioner of Count 11, which was based on the September 20, 1985 purchase from EGT. The jury also found Petitioner guilty of counts 13 and 14 for wire fraud. These counts were based on the two telephone calls Frank Harrison placed to Petitioner during the following week. The government's theory was that Petitioner was responsible for the Bennett EGT purchase, and that he had lulled Frank Harrison during the two telephone conversations into not selling out the shares, thereby causing a large loss to EGT.

The jury that voted to convict never learned that Frank Harrison, Arthur Ellis, and the firm of Eppler Guerin and Turner *had never* possessed the state securities licenses necessary to transact business in Connecticut. In addition, none of the three had ever possessed *California* state securities licenses. (The government theory at trial was that Ms. Bennett was petitioner's nominee and that petitioner, a California resident, was therefore the real purchaser of the stock. Even assuming arguendo the truth of this government theory, which petitioner does not here concede, Harrison and EGT were unlicensed under *California* law.) Petitioner did not learn of the unlicensed status of the Texas brokers until 1994, when an inquiry to Connecticut and California authorities revealed it. Copies of the Certifications from these authorities are found in the Appendix, at 9a to 13a.

After hearing from Connecticut authorities in early 1994, Petitioner hired securities expert Elwood Crandall. Crandall told Petitioner that EGT management was *quickly* aware, at the highest levels of the firm, that the firm and its brokers were not licensed in the state of Connecticut or in the state of California. Crandall opined that EGT probably made a conscious business decision to conceal their unlicensed status from Petitioner, Bennett and other

interested parties, to preserve a chance of judicial recovery for their losses. Mr. Crandall's expert opinion was attached to the 2255 petition, and is included here in the Appendix, at 14a to 26a.

Petitioner filed a petition on April 18, 1995 under 28 U.S.C. §2255 to vacate his conviction. The primary grounds offered in the §2255 petition to the district court was that Petitioner's counsel had been ineffective. Petitioner also argued that if a routine investigation of the government witnesses had been conducted, the investigation would easily have uncovered the fact that Harrison, Ellis and EGT had never been licensed to place the Bennett trade that was the subject of Counts 11, 14, and 15. Petitioner argued that since his counsel had not conducted this routine check, he had been ineffective, and that if the three Texas counts had been eliminated, the jury might not have convicted him on just the single Norbay transaction and the conspiracy charge in Count 1.

The secondary grounds offered to reverse conviction was that, as a matter of law, the jury had not convicted Petitioner of all the elements of the crime on Count 10 for securities fraud and Counts 13 and 14 for wire fraud, because the jury was never told that the property interest of Texas the stock brokerage firm was even a subject for their consideration.

The district court summarily denied Petitioner's §2255 petition, on August 3, 1995. (Appendix 7a). The Ninth Circuit affirmed the district court's denial of the §2255 petition on May 17, 1996, (Appendix 1a to 6a) with the panel holding that the fact that the brokers and brokerage firm were unlicensed to enter the order on which Petitioner was convicted was: "Irrelevant to the issue of appellant's guilt" (Appendix, at 3a).

Petitioner now asks this court to grant a Writ of Certiorari on the questions presented, for the reasons given below.

REASONS FOR GRANTING THIS WRIT

I Fundamental Principles of Criminal Law, Stressed Repeatedly by this Court over 175 Years, Require a Grant of Certiorari to Issue, and Require Reversal of Counts 11, 14 & 15

Petitioner's conduct in Counts 11, 14 and 15 was not criminal. The specific conduct charged by the government in these three counts, given the unlicensed status of the Texas stockbrokers, can not support even a *civil* securities judgment, much less a criminal conviction. The federal courts do not have the authority to make securities-related conduct that is limited to harming unlicensed brokers a crime. The U.S. Attorney does not have this discretion. Congress alone has the power to define criminal conduct.

Although the petitioner primarily stressed the issue of ineffective assistance of counsel in his §2255 petition, the issue of whether the elements of the crime had been proved under the Sixth Amendment was properly put before the Ninth Circuit, and properly put before the district court. (See Appendix page 8a, reflecting the Issues placed before the Ninth Circuit) The district court's summary dismissal and the Ninth circuit disposition indicates that these issues did not receive adequate review.

Due to the fact that the brokers were not licensed in Connecticut, the trade which underlies Count 11[4] was subject to immediate rescission, upon a simple request. If Petitioner Robert Gutstein had known about the status of the brokers and the firm, he would have placed a telephone call to Eppler, Guerin and Turner in Dallas Texas (EGT) on Monday September 30, 1985. At that time, he would have told the Texas brokers to rescind (i.e.,

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[4] Counts 14 and 15 rely quite directly for their existence on the existence of Count 11. If Count 11 falls, so must 14 & 15, since they are telephone calls, placed by Harrison of EGT to collect money due from the trade in Count 11.

cancel) the September 20, 1985 trade which underlies Count 11. The unlicensed firm would have had no choice but to comply.

By Monday 9-30-85, EGT and its two unlicensed brokers were well aware they were in violation of the Connecticut statute, and probably determined to conceal their unlicensed status. (Appendix pages 14a to 15a, Declaration of Expert Witness Crandall). EGT knew by then that it could not recover against the petitioner in a civil courtroom, under the doctrine "In pari delicto potior est conditio defendentis" meaning that where the wrong of both parties is equal, the defendant is in the stronger position.

No court of this land and no statute passed by the Congress has ever proscribed intentional conduct directed solely at unlicensed stockbrokers. In fact, this Court has indicated very much the contrary, in dealing with other elements of federal securities law. In 1988, this Court condoned "No lose" schemes, intentionally crafted by some to profit at the financial expense of securities law violators. These schemes were described as permissible, and even desirable under securities law: Pinter v. Dahl 486 US 622, 100 L.Ed.2d 658, 108 S.Ct. 2063. (See specifically, Pinter v. Dahl 100 L.Ed.2d *at* 676, Note 13).

As part of the Pinter v. Dahl holding, this Court explained that public policy considerations requiring strict securities law compliance by those who sell securities to the public make it important to permit what the court called "sophisticated investors" to intentionally create "no lose" situations for themselves, at the expense of brokers who are in violation of securities laws. The danger to stockbrokers created by the potential for legal "no lose" schemes was held to contain a public policy benefit.

As it happened, the petitioner did not discover that the Texas brokers were unlicensed in 1985, nor did his attorney do the research necessary to discover this fact in 1991. The fact that petitioner did not learn that the Texas brokers were unlicensed until

1994 does not modify his 1985 conduct in Counts 11, 14 and 15 and render that conduct criminal. The summary denial of his §2255 petition by the district court, and even the declaration by the Ninth Circuit that the licensing violation was "irrelevant" do not render this conduct criminal. Federal crimes "Are solely creatures of statute" Liparota v. United States 471 US 419, 424, 85 L.Ed.2d 434, 105 S.Ct.2084 (1985), citing United States v. Hudson, 7 Cranch 32, 3 L.Ed. 259 (1812).

When assessing the reach of a criminal statute, this court must pay close heed to language, legislative history, and purpose, in order to strictly determine the scope of the conduct which the enactment forbids. Petitioner cannot remain criminally convicted of conduct under 15 U.S.C. §§78j(b) & 78ff and 18 U.S.C. §1343 that was permissible under *civil* securities law in 1985, and which remains entirely permissible today. Such a result would create a situation in which a criminal conviction was affirmed for a crime which has never been defined by Congress. This would be a conviction without proper notice given of the proscribed conduct.

The rule of lenity also requires reversal. This time honored interpretive guideline states that ambiguity concerning the ambit of criminal statutes should be interpreted in favor of the defendant Liparota v. United States 471 US 419, 424, 85 L.Ed.2d 434, 105 S.Ct.2084 (1985), quoting Rewis v. United States, 401 US 808, 812, 28 L.Ed.2d 493, 91 S.Ct. 1056 (1971).

A Ninth Circuit panel has denied the petition because they are "not persuaded" that a revelation at trial that the Texas brokers were unlicensed would have changed anything. The Ninth Circuit panel decision is deficient, because it never addressed the basic question of whether this conduct is criminal. The 1994 revelation that the Texas stockbrokers were never licensed to enter the order on which the petitioner stands convicted requires a reversal of the judgment on Counts 11, 14 and 15. The facts of this case include a badly misinformed jury, a government witness that never told

"The whole truth", and a crime that has never been defined by statute. Chief Justice Marshall early observed, "It is the legislature, not the Court, which is to define a crime" United States v. Wiltberger, 5 Wheat 76, 95, 5 L.Ed.37(1820).

Petitioner's conduct towards the unlicensed Texas brokers on counts 11, 14 and 15 was *not* criminal. For this reason, a writ of certiorari should issue to the United States Court of Appeals for the Ninth Circuit, and those counts should be reversed by this Court.

II The Ninth Circuit Employed a Deficient Standard of Review, Resulting in a Disposition That is Plainly at Odds With The Prior Decisions of This Court

The panel's memorandum says: *"We are not persuaded"* that the unlicensed status of the Texas stockbrokers was a significant error. The memorandum disposition also states that if Frank Harrison's status as an unlicensed broker had been revealed in front of the jury, the panel doubts that this revelation could somehow have been used to impeach Harrison's testimony. The panel also found that the concealed unlicensed status of Harrison, was "Irrelevant to the issue of appellant's guilt" (Appendix, 3a)(emphasis added).

This Court should grant Certiorari, because the "Appellant guilt" referred to by the panel was determined by a jury that was wholly in the dark about the true status of government witness Frank Harrison. The panel finding that that the unlicensed status of this broker victim was "irrelevant" is based on a deficient standard, given the central importance afforded registration and disclosure issues in all securities cases. In a criminal case, the finding is deficient to an amazing degree. Where a deficient standard of review has been employed by lower court, this Court has reversed and remanded. Yates v. Evatt (1991) 500 US 391, 114 L.Ed.2d 432, 111 S.Ct. 1184.

Proper registration is a central issue in any securities case.

In a criminal securities case, where a defendant's liberty is a stake and the lifelong brand of felon may attach as a result of a conviction, registration issues assume an even greater significance. This Court has held that "The registration requirements are at the heart of the act, and Section §12(1) imposes strict liabilities for violating those requirements". Pinter v. Dahl (Id.) 486 US at 638, 100 L.Ed.2d at 676. The particular registration statute violated by the Texas brokers has been held by the Second Circuit to be a "Remedial statute that should be construed liberally" Borthwick v. First Georgetown Securities 892 F2d 178 (2d Cir. 1989) (Holding the Connecticut registration statute to not violate the Commerce Clause of the United States Constitution.)

Petitioner Gutstein was entitled to harmless error analysis by the Ninth Circuit on the unlicensed broker issue in this "man bites dog" securities case. It is entirely possible that if the jurors had known that the Texas stockbroker who played such an important role in this trial did not possess a legally sufficient securities license, the outcome would have been quite different.

In the garden variety securities case, a broker/seller of securities is most often accused of harming a customer/buyer. This case presents a set of facts in which the opposite situation exists: a *customer* is accused, in a criminal securities indictment, of harming a *stockbroker* by not paying for a trade. If the jury that sat in judgment of the petitioner had been informed that neither the broker nor his firm had ever been licensed to enter the September 20, 1985 trade that formed the basis of Count 11, the outcome might have been quite different on Counts 11, 13 and 14.

Harrison's testimony became important to the government's case when the government had Harrison testify at length about his telephone conversations with petitioner/defendant Robert Gutstein. In these conversations, Harrison was trying to collect money from the petitioner. The jury heard several recorded conversations

between Harrison and the petitioner, and saw transcripts of them. The jury never learned what Harrison knew all along: as an unlicensed broker, he and his firm lacked any legal standing to collect for the trade entered on September 20, 1985. In fact, Arthur Ellis and EGT violated the Connecticut statute on the day the trade was entered. The Ninth Circuit finding that this factor is "irrelevant" simply does not make any sense, under these facts.

If the jury had learned that EGT had attempted and succeeded in concealing their unlicensed status in a prior civil case, the jury's view of the integrity of the government's case might have been undermined to the point of a complete acquittal. As it was, the jury acquitted on 13 out of 18 Counts. If the unlicensed broker issue had come to light and the EGT counts had been eliminated, the government's case would have been in a shambles.

Under this factual situation, the Ninth Circuit's conclusory analysis of the unlicensed broker issue is badly deficient, and well worthy of correction by this Court. The Ninth Circuit statement that "We are not persuaded" answers the wrong question. The proper question is whether it can be found beyond a reasonable doubt that the jury would have been persuaded by the government to vote for the conviction of the petitioner, if had it known that neither the broker nor his firm were properly licensed.

When an element of the crime that must be found by the jury is removed from the reach of the jury, the jury faces the evidence "With the wrong question in mind" Scalia, Associate Justice, concurring in Yates v. Evatt 500 US 391,114 L.Ed.2d 432, 111 S.Ct. 1184 (1991)(holding that deficient standard of review requires reversal).

"The Sixth Amendment requires that all elements of the crime be found by the jury-and not just by appellate judges reviewing the record": United States v. Caldwell 989 F2d 1061 (9th Cir. 1993); Carella v. California 491 U.S. 263, 268-69, 109 S.Ct. 2419,

2422, 105 L.Ed.2d 218 (Scalia, J., concurring); Bollenbach v. United States, 326 US 607, 66 SCt. 402, 90 LEd. 350 (1946).

The Ninth Circuit analysis is badly deficient and contrary to many decisions of this court relating to removal of an element of the crime from the jury's determination. The Ninth Circuit analysis invades the truth finding task "assigned solely to juries in criminal cases" Carella v. California 105 L.Ed.2d at 221. The jury could easily have found that the conduct in counts 11, 14 & 15 was not even criminal, as suggested earlier in Reason I. Under these circumstances , the interests of justice require reversal.

III This Court Should Grant Certiorari to Provide Guidance About the Role of Broker Registration Statutes and Securities Law Violations

At the present time, more Americans are personally involved in the stock market than at any time in history. Many citizens become customers of stockbrokers who market to them across state lines using the traditional telephone services, fax machines, and most recently, the Internet. Is it possible for a customer to defraud an unlicensed stockbroker by not paying for a transaction? Is an unlicensed stockbroker protected by the federal wire fraud law? In McNally v. United States, this court held that the federal mail and wire fraud laws "Had (their) origin in the desire to protect individual property rights" McNally v. United States 483 US 350 at 360, 97 L.Ed.2d 292 at 302, 107 S.Ct. 2875 (1987)

A prior decision of this Court (Pinter v. Dahl) indicates that it is permissible for a sophisticated customer to set up a "no lose" scheme. Is such a scheme possible, using violations of the state broker registration laws? Are these laws irrelevant, and if so, to what degree? Is the In pari delicto defense, held available in civil cases in Pinter v. Dahl, available in a criminal case? The petitioner asks this Court to address these issues.

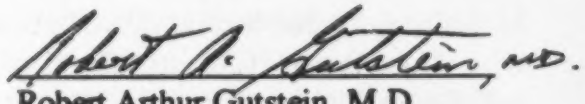
SUMMARY AND REQUEST FOR RELIEF

This case presents a substantial number of issues of first impression that are worthy of the time and attention of this Court. The petitioner is a licensed California physician and surgeon who is not likely to ever again face a criminal court, yet he remains professionally burdened by the verdict that was reached by a badly misinformed jury in 1991. There are no factual issues in any dispute in this case. Petitioner requests that this Court issue a writ of Certiorari to review, as a matter of law, the decision of the United States Court of Appeals for the Ninth Circuit.

VERIFICATION

I am Robert Arthur Gutstein M.D., the Pro Se Petitioner for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. I swear that this petition is true and correct to the best of my knowledge and belief.

Signed in Los Angeles, on this 14th Day of August, 1996.



Robert Arthur Gutstein, M.D.

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ARTHUR GUTSTEIN, aka; ROBERT A GUTSTEIN, aka: ROBERT GUTSTEIN,	) No. 95-56216
	) D.C.CV-95-02526-TJH
Petitioner-Appellant,	)
v.	)
UNITED STATES OF AMERICA,	) **MEMORANDUM***
Respondent-Appellee.	)

Appeal from the United States District Court
for the Central District of California
Terry J. Hatter, Jr., District Judge, Presiding

Argued and Submitted May 6, 1996
Pasadena, California

Before: **HALL, O'SCANNLAIN**, and **KLEINFELD**, Circuit Judges.

Robert Gutstein appeals the district court's denial of his habeas corpus petition in which he alleged that he received ineffective assistance of counsel in his criminal trial on conspiracy, securities fraud, wire fraud, and bank fraud charges. We affirm.

* This disposition is not appropriate for publications and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I

In order to obtain relief on the grounds that he received ineffective assistance of counsel, Gutstein must first prove that his counsel, Joel Levine's performance was "deficient."

Strickland v. Washington, 466 U.S. 668, 687 (1984). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. We conclude that Gutstein has failed to make the required showing. Indeed, the fact that Gutstein was acquitted on the majority of the charges against him and received a lenient sentence strongly suggests that his counsel's performance was not "deficient." See, e.g., De Roche v. United States, 337 F.2d 606, 607 (9th Cir. 1964) ("[T]he record clearly shows no impairment of the right [to effective counsel] falling below constitutional standards. To the contrary, De Roche was acquitted on two of the three counts.").

More specifically, we are not persuaded by any of Gutstein's specific allegations of error. First, we find no error in the decision not to call Herb Stone as a witness. Not only is Stone's unsigned affidavit insufficient to support Gutstein's argument that Stone would testify as Gutstein states that he would, Levine's own declaration explicitly states that his decision not to call Stone to the stand was a "tactical and strategic one." Levine apparently believed that "Stone's testimony would tend to show that Gutstein was more involved in buying and selling of Magna stock than would be helpful to the defense." As this court has previously noted, "[a] tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel." Guam v. Santos, 741 F.2d 1167, 1169 (9th Cir. 1984) (citing Strickland).

Second, we reject Gutstein's argument that Levine erred by (1) failing to use (a) Bob McGiboney's SEC deposition and (b) a

taped telephone conversation between McGiboney and Frank Harrison to impeach Harrison's testimony, and (2) failing to call Bob McGiboney to the stand as a witness. In particular, we note that McGiboney does not explicitly state, in either the SEC deposition testimony or the transcript of the telephone call, that he placed Robyn Bennett's order. Moreover, in other portions of his testimony McGiboney twice explicitly denied placing any order for Bennett. As such, we conclude that Levine did not err in attempting to impeach Harrison with this testimony.

Third, we find no error in Levine's alleged failure to investigate and use Harrison's and EGT's alleged violations of state "blue sky" laws. Not only are these alleged violations irrelevant to the issue of appellant's guilt on the wire fraud, securities fraud, and conspiracy convictions, we are also not persuaded by Gutstein's argument that Levine could have somehow used the fact of these violations to impeach Harrison's testimony.

Fourth, in light of (1) Gutstein's failure to proffer evidence showing that Robyn Bennett would have testified to such alleged facts as her affair and drug use with Rubenstein, and (2) Levine's declaration that he had no recollection of Gutstein informing him about such alleged facts, we find no error in Levine's alleged failure adequately to impeach Bennett.

Fifth and finally, we reject Gutstein's argument that the wire and securities fraud statutes contain a "victim requirement," and that because of EGT's and Harrison's "blue sky" violations, he could not, as a matter of law, have been convicted of wire and securities fraud.

As to the wire fraud, this court has held that "[t]o allege a violation of the wire and mail fraud provisions, we have required only that the government show that there is (1) a scheme to defraud, (2) a use of the mails or wires in furtherance of the scheme, and (3) a specific intent to deceive or defraud." United States v. Bonallo,

858 F.2d 1427, 1433 (9th Cir. 1988) (citation omitted). In addition, "it is well established that: in a prosecution under 18 U.S.C. § 1343 . . . the prosecution need not prove that the scheme was successful or that the intended victim suffered a loss or that the defendant secured a gain." United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir.) (citation, internal quotation omitted), cert. denied, 439 U.S. 896 (1978). Accordingly, Gutstein's argument that he could not have been convicted of wire fraud, because the government did not prove that his conduct created a "victim" who had a right to recover for damage to his or her property rights, necessarily fails.

Similarly, to convict a defendant for securities fraud under 15 U.S.C. § 78j(b), 15 U.S.C. § 78ff and 17 C.F.R. § 240.10b-5 (Rule 10b-5), the government must prove that the defendant: (1) willfully and knowingly;[1] (2) employed any device, scheme or artifice to defraud, or made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or engaged in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; (3) in connection with the purchase or sale of any security; (4) by using or employing any means or instrumentality of interstate commerce, the mails, or any facility of any national securities exchange. Accordingly, we reject Gutstein's argument that the government had to also prove that there was a "victim" capable of suing for damages in order to prosecute Gutstein for securities fraud.

In sum, Gutstein has failed to demonstrate that Levine's performance was "deficient" under Strickland. To the contrary, we

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[1] This court has also affirmed convictions in cases in which the district court applied a mens rea of recklessness. See United States v. Farris, 614 F.2d 634, 638 (9th Cir. 1979), cert. denied, Baumann v. United States, 447 U.S. 926 (1980).

conclude that Levine's performance far exceeded the constitutional minimums.

II

In addition to showing that Levine's performance was constitutionally "deficient," Gutstein "must [also] show that the deficient performance prejudiced the defense." Strickland, 466 U.S. at 687. "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Even if we were to find that Levine's performance was constitutionally "deficient," Gutstein has failed to demonstrate that he was prejudiced by any of Levine's alleged errors. _ In particular, we note the existence of substantial evidence in support of Gutstein's conviction which was not affected by any of Levine's alleged errors. As this court noted,

> The jury heard a substantial amount of testimony from which it could rationally draw inferences to support a finding beyond a reasonable doubt that Gutstein knew about and was involved in the manipulation scheme. Robert Bonito and Randy Catanese testified to Gutstein's presence at meetings during which Rubenstein described his "smoke and mirrors" plan to manipulate Magellan stock, and to Gutstein's acknowledgment of and assent to Rubenstein's statements. Bonito and Catanese also described Gutstein's disregard of their warnings to Gutstein to disengage himself from the illegal scheme. Michael Giuffre testified to his refusal of Gutstein's request that he add substantial assets to Magna's financial statements, and Gutstein's failure to provide supporting documentation for those assets. Manny Cuizon testified to Gutstein's involvement in the preparation of false press releases. And a number of witnesses provided considerable testimony from which a jury could conclude Magna was not a viable company.

United States v. Gutstein, No. 91-50704, 1992 WL 354151 at **2 (9th Cir. Nov. 30, 1992) (unpublished disposition). As the government correctly points out, appellant "makes no claim that Robert Bonito, Randy Catanese, Manny Cuizon, Michael Giuffre, or any of the witnesses who testified that Magna was not a viable company could have been further impeached."

In sum, even assuming arguendo that Levine committed certain "errors," we are not persuaded that Gutstein has failed to show that he was deprived of a fair trial.

III

For the foregoing reasons, we affirm the district court's denial of Gutstein's habeas petition.[2]

AFFIRMED.

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[2] Because Gutstein's "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief," 28 U.S.C. § 2255, Gutstein was also not entitled to an evidentiary hearing, and the district court did not abuse its discretion in not holding one.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ROBERT ARTHUR GUTSTEIN Defendant.	CV 95-2526-TJH MINUTE ORDER OF JUDGE HATTER

THE COURT having fully considered the defendant's Section 2255 motion, the government's response and the defendant's reply, IT IS ORDERED that said motion is DENIED.

CC: Counsel of Record

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	CA 95-56216
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	
	)	APPELLANT'S
	)	OPENING BRIEF
	)	
ROBERT ARTHUR GUTSTEIN	)	
	)	
Defendant-Appellant.	)	
----------	)	

ISSUES PRESENTED FOR REVIEW

1. Was it Error for the District Court to Deny Appellant's 2255 motion, which proved Ineffective Assistance of Counsel?

2. Was it Ineffective Assistance of Counsel for Levine to fail to Investigate and Use Impeachment and Bias Evidence Against the Two Government Witnesses on the Counts of Conviction?

3. Did Appellant Prove, as a matter of Law, that the Victim Element of the Securities Fraud and Wire Fraud statutes was Missing?

4. Was the Denial of Appellant's Request for an Evidentiary Hearing Reversible Error; or Should this Court Reverse Appellant's Conviction Without a Remand?

CONNECTICUT GENERAL STATUTES

VOLUME 16, TITLES 36 TO 37

§36-474. BROKER-DEALER, AGENT OR INVESTMENT ADVISOR REQUIRED TO REGISTER

(a) No person shall transact business in this state as a broker-dealer or agent unless he is registered under this chapter.

§36-498. BUYERS REMEDIES

(f) No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any regulation or order thereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which making or performance was in violation , may base any cause of action on the contract.

CERTIFICATION

STATE OF CONNECTICUT
COUNTY OF HARTFORD

On behalf of the Banking Commissioner, I, Cynthia Antanaitis, Assistant Director with the Securities and Business Investments Division (the "Division") of the Department of Banking of the State of Connecticut, do hereby certify that a review of broker-dealer agent files maintained by this division reveals the following:

That no record is on file indicating that Arthur Stanwood Ellis (CRD 200287) was ever registered with this Divison as a Connecticut agent of a broker dealer.

That no record is on file indicating that Frank Walls Harrison Jr. (CRD 238309) was ever registered with this Divison as a Connecticut agent of a broker dealer.

_____*(signed)*_____
Cynthia Antanaitis, Assistant Director

10th day of February, 1994

STATE OF CONNECTICUT
COUNTY OF HARTFORD

CERTIFICATION

A review of the broker dealer registration files of the Securities and Business Investments Division (the "Division") of the Department of Banking of the State of Connecticut, do hereby certify that a review of broker-dealer agent files maintained by this division reveals the following:

That Principal Financial Securities, Inc. (a/k/a Eppler, Guerin and Turner) of 145 Ross Avenue, Suite 300, Dallas, Texas was not registered with the Securities and Investments Division as a broker-dealer between January 1, 1985 and December 31, 1985.

_____*(signed)*_____
Cynthia Antanaitis, Assistant Director
Securities and Business Investments
Division

Dated this Tenth
day of February, 1995

STATE OF CALIFORNIA
DEPARTMENT OF CORPORATIONS

CERTIFICATE OF SEARCH

I, GARY S. MENDOZA, Commissioner of Corporations of the state of California, hereby certify that a dilligent search has been made of the records of the Department of Corporations and as a result thereof, it is found that as of March 3, 1994, the existing records of this Department do not disclose a report of employment of **FRANK WALLS HARRISON, JR.** as an Agent during the year 1985, as provided in Commissioner's Rule 260.210, Title 10, California Code of Regulations.

GARY S. MENDOZA
Commisioner of Corporations

STATE OF CALIFORNIA
DEPARTMENT OF CORPORATIONS

CERTIFICATE OF SEARCH

I, GARY S. MENDOZA, Commissioner of Corporations of the state of California, hereby certify that a diligent search has been made of the records of the Department of Corporations and as a result thereof, it is found that as of March 3, 1994, the existing records of this Department do not disclose a report of employment of **ARTHUR STANWOOD ELLIS** as an Agent during the year 1985, as provided in Commissioner's Rule 260.210, Title 10, California Code of Regulations.

GARY S. MENDOZA
Commisioner of Corporations

DECLARATION OF ELWOOD A. CRANDALL

I, Elwood A. Crandall, declare and state as follows: I am a former Managing Director, Vice president and Branch Manager for Merrill Lynch, and other New York Stock Exchange (NYSE) Member Firms, a recognized expert in the securities field, and a former house counsel for an NYSE member firm. I have testified as an expert witness in two United States federal court cases, in two California State court cases, and nine National Association of Securities Dealers (NASD) arbitrations. [My Curriculum Vitae is attached hereto as Exhibit "A", and incorporated in full herein, by this reference]. All the matters contained herein are of my own knowledge and experience, and, if called upon, I could and would competently testify thereto. The opinions I express in the matters outlined below, as an expert in the field of securities, are based on knowledge and experience and on my review of the documents and records in the case of United States v. Robert A. Gutstein, CR-157-TJH.

This declaration will address the following issues:

A: THE SIGNIFICANCE OF THE FAILURE OF CERTAIN REGISTERED REPRESENTATIVES AND THEIR FIRM TO BE LICENSED AS REQUIRED BY CONNECTICUT BLUE SKY LAWS.

B: REASONABLE INQUIRY BY DR. GUTSTEIN'S ATTORNEY WOULD HAVE IMMEDIATELY UNCOVERED THE REGISTERED REPRESENTATIVES' AND THEIR FIRM'S UNLICENSED STATUS.

C: THE BROKERS AND BROKERAGE FIRM IN THIS CASE WERE AWARE OF THEIR UNLICENSED STATUS.

D: THE PURPOSE FOR CONCEALMENT OF UNLICENSED STATUS AND VIOLATIONS OF BLUE SKY LAWS.

E: THE MESSAGE LEFT WITH THE BROKERAGE FIRM SECRETARY DOES NOT FULFILL THE

"MEETING OF THE MINDS" REQUIREMENT FOR A VALID SECURITIES TRADE.

F: THE SIGNIFICANCE OF THE TELEGRAM TO NOR-BAY SECURITIES WHICH DIRECTED THE TRANSFER OF $72,000 FROM THE ACCOUNT OF JACOB RUBENSTEIN TO THE ACCOUNT OF ROBYN BENNETT.

A. THE SIGNIFICANCE OF THE FAILURE OF CERTAIN REGISTERED REPRESENTATIVES AND THEIR FIRM TO BE LICENSED AS REQUIRED BY CONNECTICUT BLUE SKY LAWS

The records in the Gutstein trial indicate that Arthur Ellis, ("Ellis") of the Texas brokerage firm Eppler Guerin and Turner ("EGT") entered a common stock order for Connecticut resident Robyn Bennett. This order, which was the basis for Dr. Gutstein's securities fraud conviction on Counts 11, and wire fraud convictions on 14 and 15, was entered by Ellis on behalf of Frank Harrison, ("Harrison") another broker at EGT. The record indicates that Counts 14 and 15 are wire fraud counts, based on phone calls made by Harrison, at-

tempting to collect money from Dr. Gutstein for the Bennett trade.

The Certification of records from the Division of Banking of the State of Connecticut, signed by Cynthia Antanaitis, Assistant Director, indicates that, as of February 10, 1994, neither Frank W. Harrison, nor Arthur S. Ellis of EGT had ever been registered as a broker-dealer agent, under Connecticut's Blue Sky law. (See Exhibit _____). An additional Certification from the Connecticut Department of Banking, dated February 10, 1995 indicates that the EGT firm was not registered as a broker-dealer under Connecticut's Blue Sky laws. (See Exhibit _____)

Since neither Ellis, Harrison nor EGT were licensed to do business in the State of Connecticut, they had no right to transact business in that state, and no right of recovery for any stock orders they placed for Connecticut resident Robyn Bennett. The Connecticut Certification documents, when read in conjunction with the record of this case, lead to the following conclusions:

a. Dr. Gutstein was convicted of securities fraud in Count 11, and wire fraud in Counts 14 and 15, in connection with

an illegal underlying transaction. The convictions were for situations in which EGT, Harrison and Ellis, the purported "victims" had no legal right to collect any money, and therefore had no standing as victims.

b. Dr. Gutstein's trial attorney did not use this information in his client's defense. Apparently, he failed to make the customary pre-trial inquiry to uncover these facts. It is the standard and practice in the securities industry to conduct an investigation into compliance with Blue Sky laws when evidence of a securities transaction is part of a trial.

c. The securities issues in Dr. Gutstein's trial were of such complexity as to require the presence of a securities expert as an expert witness for the defense. At a minimum, Dr. Gutstein's attorney should have consulted an expert in the preparation of his client's defense. A competent securities expert would have automatically inquired into all witness' and victims' compliance with Blue Sky and other licensing laws, and would have advised the defense of the significance of the violations.

B. REASONABLE INQUIRY BY DR. GUTSTEIN'S ATTORNEY WOULD HAVE IMMEDIATELY UNCOVERED THE REGISTERED REPRESENTATIVES' AND THEIR FIRM'S UNLICENSED STATUS IN CONNECTICUT.

The license status of a broker-dealer or an agent in any state, including Connecticut, is a matter of public record: a simple phone call or letter is all that is required. Dr. Gutstein's trial attorney was given the government's witness list, which indicated that brokers Frank Harrison and Art Ellis were scheduled to testify against his client, as the brokers involved in the Connecticut order underlying the 3 charged counts.

Upon receiving this list, a competent attorney trying a securities case would have immediately investigated these brokers' legal ability to do business in Connecticut, Bennett's state of residence, and would have used this information in the client's defense.

C. THE BROKERS AND BROKERAGE FIRM IN THIS CASE WERE AWARE OF THEIR UNLICENSED STATUS.

Blue Sky issues are central to the viability of any trade. All brokerage firms take great pains to avoid non-compliance, and to learn of any non-compliance very quickly. The vital significance of compliance with Blue Sky laws has caused virtually all NYSE firms to implement compliance systems, keyed to immediately identifying any possible Blue Sky violations. The record, showing that EGT made immediate attempts to have Harrison collect from Dr. Gutstein, even before the due date, indicates EGT had an active compliance department. I am not aware of any NYSE firms that do not have some compliance procedures and systems in place, to guard against Blue Sky violations. Normally, a firm's order system causes a trade that might be a Blue Sky violation to be "kicked out" of the flow of confirmations printed by the firm after the close of the market each day. These potential violations are then brought to the attention of a branch manager, or designated compliance officer.

The NYSE Compliance Systems described above normally identify a Blue Sky violation within one day of the trade date: on many occasions, a violation is caught on the day of the trade. Any Blue Sky violation not identified immediately by

the order room confirmation system would be caught later by management, in the process of collecting the money due on the trades. Every brokerage firm must collect money owed from customers within five business days. In the case of a large transaction, such as the transaction underlying Counts 11, 14 and 15, management attention to collection would be intense. In my opinion, there is no reasonable possibility that the management at EGT was not aware of the unlicensed status of its brokers, very soon after the trade which underlies Counts 11, 14 and 15. Certainly EGT management was aware of the firm's unlicensed status.

D: THE PURPOSE FOR CONCEALMENT OF UNLICENSED STATUS AND VIOLATIONS OF BLUE SKY LAWS.

Eppler, Guerin and Turner sued Dr. Gutstein, in an attempt to recover their money. In order for Harrison and EGT to preserve their opportunity to collect any money on the trade underlying Counts 11, 14 and 15 they had to conceal information about their unlicensed status from Dr. Gutstein and the courts, because their Blue Sky law violations precluded recovery. In my opinion, Ellis, Harrison, and EGT deliberately

concealed their unlicensed status, so as to maintain their legal status as victims. The documents in this case indicate that the fraud perpetrated on this court by Harrison in United States v. Gutstein was also perpetrated in the Texas federal court case: Eppler Guerin and Turner v. McGiboney, Rubenstein, Gutstein et al. Civil Action No. CA3-85-2049-H (See Exhibit _____).

In the Texas Civil trial, news of EGT's unlicensed status would have been dispositive against EGT, precluding any recovery for the Bennett transaction. Information about the unlicensed status of Harrison and Ellis would have damaged the government's case against Dr. Gutstein, in United States v. Gutstein, because they could not claim to be the victims required by the securities and mail fraud statutes

E. THE MESSAGE LEFT WITH THE BROKERAGE FIRM SECRETARY DOES NOT FULFILL THE "MEETING OF THE MINDS" REQUIREMENT FOR A VALID SECURITIES TRADE.

Robyn Bennett, in her trial testimony, indicated that she called EGT and spoke to a secretary, not a licensed broker.

She testified that, later in the day, Art Ellis called her back and confirmed that she had purchased 20,000 shares of Magna Technologies stock. (See RT _____). It is clear from the trial transcript that neither Ellis nor any other broker at the firm spoke to Robyn Bennett for the purpose of making the necessary inquiries in order to place Bennett's trade. For a trade to be considered valid, it is the industry standard and practice to adhere to the legal requirements for a valid contract, which requires there be a "meeting of the minds" about price, quantity, and the settlement of the trade. In addition, it is the industry standard that the order for the trade be given a licensed broker so that a reasoned judgment concerning the suitability of the trade for the client can be made. The client must be given the opportunity before the order is placed to make an informed choice concerning the purchase, and must then approve the terms and conditions. Any trade in which a customer speaks only to an unlicensed secretary cannot stand as a valid trade. Bennett's conversation with the secretary did not contain the elements required for a valid trade. It is clear from her testimony that she erroneously believed that her inquiry to the secretary was sufficient.

F. THE SIGNIFICANCE OF THE TELEGRAM TO NORBAY SECURITIES, WHICH DIRECTED THE TRANSFER OF $72,000 FROM THE ACCOUNT OF JACOB RUBENSTEIN TO THE ACCOUNT OF ROBYN BENNETT.

During the course of Dr. Gutstein's criminal trial, the government introduced a telegram sent in September of 1985, from Jacob Rubenstein to Norbay Securities. (See Exhibit _____) The telegram directed convicted co-conspirator Herb Stone of Norbay Securities to transfer $72,000 from Rubenstein's account to the account of Robyn Bennett. Dr. Gutstein's attorney did not point out the significance of this request for the transfer of a large sum of money, which raises questions that must be answered in the context of the government's case against Dr. Gutstein. The government claimed that Robyn Bennett was Dr. Gutstein's nominee in a transaction with Norbay Securities. This transaction was the basis for Dr. Gutstein's conviction on Count 4 ("the Norbay Transaction"). Robyn Bennett, testifying under a grant of immunity from the government, sought to portray herself as being alienated from Rubenstein, to the point of not being on

speaking terms with him. She placed the blame for the Norbay Transaction exclusively on Dr. Gutstein's conversations with her.

This testimony by Bennett, portraying enmity between herself and Rubenstein, makes the transfer of $72,000 significant, because the transfer contradicts her testimony that she had nothing to do with Rubenstein, who was using Herb Stone as a collaborator. It is the standard and practice of the securities industry to require an original executed letter of authorization from the customer transferring the funds before completing the transfer. There are many reasons for this, one of the most important reasons is to determine the real party in interest in the transaction. This particular request for the transfer of funds had two large "red flags". First, the fact that the transfer was requested by a telegram which was unsigned. Second, the size of the requested transfer. There was a clear duty of inquiry on the part of the brokerage firm handling the transaction to determine the reasons for the transfer. There was also a clear duty on the part of Dr. Gutstein's attorney to investigate this and bring it to the attention of the jury.

In this case, it might have been determined that Rubenstein was the real party in interest, using a nominee to affect a market, where the real party in interest was avoiding detection. It might have been determined that the transfer was either a gift from Mr. Rubenstein to Ms. Bennett, or part of an ongoing financial relationship. In my opinion, this transfer indicates that Rubenstein and Bennett were engaged in some sort of independent financial transactions. Bennett's testimony that she had nothing to do with Rubenstein placed the responsibility for the Norbay transaction exclusively with Dr. Gutstein. A securities expert would have alerted the defense to the significance of this government exhibit: the potential to impeach Bennett's testimony for the prosecution, by showing that she was lying when she claimed no relationship with Rubenstein.

I declare under the penalty of perjury that the forgoing is true and correct, and executed on March 23, 1995,
at Los Angeles, California.

(SIGNED)

Elwood A. Crandall